

F. v. LING

[LCA 96/1985]

1985. Supreme Court: Underwood J.

Sept. 9, 24, 1985.

Criminal Law — Criminal liability and capacity — Mens rea — Statutory offence — Driving with alcohol in blood — Honest and reasonable belief that no alcohol remained — Whether defence excluded — Onus of proof — Reasonableness of belief — “Breathalyser” machine in hotel — Road Safety (Alcohol and Drugs) Act 1970, s.6 (2).

Statutes — Interpretation — Particular classes of statutes — Penal statutes — Ambiguity — Whether need of mens rea excluded — Road Safety (Alcohol and Drugs) Act 1970, s.6(2).

Vehicles and Traffic — Offences — Alcohol and drug related offences — Driving with alcohol in blood — Defence — Honest and reasonable mistake of fact — Whether excluded — Road Safety (Alcohol and Drugs) Act 1970, s.6(2).

The presumption that *mens rea* is required in statutory offences is not excluded by anything in the subject matter or language of the *Road Safety (Alcohol and Drugs) Act 1970, s.6*, and accordingly honest and reasonable mistake of fact is a defence to a charge of driving with alcohol in the blood.

He Kaw Teh v. The Queen (1985), 157 C.L.R. 523, applied.

MOTION TO REVIEW.

F, a child, was charged on 5th August 1985 before I.R. Matterson, Esq., Magistrate, on the complaint of First Class Constable Ling with driving a motor vehicle on Main Road at Glenorchy with alcohol in his blood whilst being a first year driver contrary to s.6(2) of the *Road Safety (Alcohol and Drugs) Act 1970* and pleaded not guilty. It appeared that on 10 May 1985 the defendant was apprehended driving a motor vehicle with a blood alcohol concentration of 0.04mg of alcohol in 100ml of blood. The breathalyser reading was not disputed but the defendant claimed that he was under an honest and reasonable mistake of fact as to the presence of alcohol in his body because he had used a “breathalyser” machine at a hotel and obtained a reading of “0.00” prior to driving. The magistrate convicted the defendant and held

that the defence of honest and reasonable mistake and the doctrine of *mens rea* did not apply to the section.

The defendant moved to review the conviction on the grounds that:

- "1. That the learned magistrate erred in law in holding that the defence of 'honest and reasonable mistake of fact' was not open to a charge under s.6(2) of the Road Safety (Alcohol and Drugs) Act 1970.
- "2. That the learned magistrate erred in law and in fact in holding that appellant did not have an honest and reasonable belief that he did not have alcohol in his body when driving.
- "3. That the conviction was against the evidence and the weight of the evidence."

R. J. Blissenden for the applicant.

A. G. Melick for the respondent.

Cur. adv. vult.

SEPTEMBER 24.

UNDERWOOD J., after setting out how the matter came before the court, the grounds of appeal, the provisions of the *Road Safety (Alcohol and Drugs) Act* 1970, s.6(2), and the provisions of the *Child Welfare Act* 1960, s.18(2), in relation to the publication of the applicant's name, continued:

The first ground of appeal involves a question of statutory interpretation. Did Parliament intend that conduct forbidden by s.6(2) would be punishable even if unaccompanied by a guilty mind? A negative answer to that question gives rise to another question; what kind of mental state must attend the proscribed conduct before the offence is complete?

Neither s.6(1) (driving with a blood alcohol content in excess of the prescribed concentration) nor s.6(2) contain any words such as "knowingly" or "wilfully" which would clearly indicate that the legislature intended *mens rea* to be an ingredient in the offence.

However, it is not uncommon to find statutory offences described solely by reference to their external elements. The absence of words referring to a mental state does not necessarily mean that some kind of *mens rea* is not an ingredient of the offence. Statutes are presumed to be enacted within that part of the general framework of the common law set out in the oft quoted statement from *Sherras v. De Rutzen* [1895] 1 Q.B. 918, at p.921:

"There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be

displaced either by the words of the statute creating the offence or the subject-matter with which it deals, and both must be considered."

Lord Simon of Glaisdale said in *Reg. v. Majewski* [1977] A.C. 443, at p.478, in speaking of the expression *mens rea*:

"This wrongful state of mind can vary greatly with various offences contained in the criminal code, as is shown by the quotations of my noble and learned friend on the Woolsack from the judgment of Stephen J. in *Reg. v. Tolson*, 23 Q.B.D. 168, 185, and 187. *Mens rea* is therefore on ultimate analysis the state of mind stigmatised as wrongful by the criminal law which, when compounded with the relevant prohibited conduct, constitutes a particular offence."

In *Reg. v. Tolson* (*supra*), Cave J. said, at p.181:

"At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the prisoner is indicted an innocent act has always been held to be a good defence."

It might be thought that, for a period of time, strength of the presumption that some kind of *mens rea* was an essential ingredient in every offence had been weakened. *Proudman v. Dayman* (1941) 67 C.L.R. 536 concerned a charge of permitting an unlicensed person to drive a motor vehicle contrary to the South Australian *Traffic Act*. At p.540 Dixon J. said this:

"As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.

"The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one."

In *Hobbs v. Winchester Corporation* [1910] 2 K.B. 471 Kennedy L.J. said at p.483 that, "I think there is a clear balance of authority

that in construing a modern statute this presumption as to mens rea does not exist". The same view was expressed in different words by O'Bryan J. in *McCrae v. Downey* [1947] V.L.R. 194, at p.199. Such judicial expression has given rise to a belief that the strength of the presumption has weakened. Resort to cases in the United Kingdom such as *Reg. v. Warner* [1969] 2 A.C. 256 and *Sweet v. Parsley* [1970] A.C. 132; in the Privy Council, *Lim Chin Aik v. The Queen* [1963] A.C. 160 and in the High Court *Cameron v. Holt* (1980) 142 C.L.R. 342, demonstrates that such a belief is unsound.

The decision of the High Court in *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523 put the position beyond any doubt. All of the learned justices were of the opinion that:

- (1) The terms of the legislation under consideration (the *Customs Act* 1901, s.233B) were not such as to exclude "the defence" of honest and reasonable mistake.
- (2) The so-called defence was no more than one aspect of the broad question of *mens rea*.
- (3) In line with the decision of *Woolmington v. The Director of Public Prosecutions* [1935] A.C. 462 once the evidentiary burden was satisfied by the accused the onus of proving the absence of honest and reasonable mistake lay upon the prosecution.

After an extensive survey of the law relating to the place of *mens rea* in statutory offences Brennan J., at p.582, summed up his conclusions upon the general principles as follows:

- "(1) There is a presumption that in every statutory offence, it is implied as an element of the offence that the person who commits the *actus reus* does the physical act defined in the offence voluntarily and with the intention of doing an act of the defined kind.
- "(2) There is a further presumption in relation to the external elements of a statutory offence that are circumstances attendant on the doing of the physical act involved. It is implied as an element of the offence that, at the time when the person who commits the *actus reus* does the physical act involved, he either —
 - (a) knows the circumstances which make the doing of that act an offence; or
 - (b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.

- "(3) The state of mind to be implied under (2) is the state of mind which is more consonant with the fulfilment of the purpose of the statute. *Prima facie*, knowledge is that state of mind.
- "(4) The prosecution bears the onus of proving the elements referred to in (1) and (2) beyond reasonable doubt except in the case of insanity and except where the statute otherwise provides."

[His Honour's emphasis]

Although *Maher v. Musson* (1934) 52 C.L.R. 100 is authority for the proposition that the onus of establishing a reasonable mistake of fact lies on the accused, Gibbs C.J. pointed out that *Maher v. Musson* was decided before *Woolmington v. The Director of Public Prosecutions* [1935] A.C. 462 and that the suggestion in the judgment of Dixon J. in *Proudman v. Dayman* (1941) 67 C.L.R. 536 to the same effect was vague. Gibbs C.J., at p.535 said:

"However it has now become more generally recognised, consistently with principle, that provided that there is evidence which raises the question the jury cannot convict unless they are satisfied that the accused did not act under the honest and reasonable mistake."

Wilson J., at p.558 took the same view about *Maher v. Musson* saying that it was no longer determinative of the issue under consideration but did add:

"It is unnecessary to consider whether the force of that decision" [*Maher v. Musson*] "remains unimpaired in the case of some minor statutory offences of a strict liability kind which carry a modest penalty. First and foremost it is a question of the construction of the particular statute in every case."

Dawson J. did not express the same reservation in reaching the same conclusion about *Maher v. Musson*. At p.592 his honour said:

"There is, however, no justification since *Woolmington v. The Director of Public Prosecutions* for regarding the defence of honest and reasonable mistake as placing any special onus upon the accused who relies upon it. No doubt the burden of providing the necessary foundation in evidence will in most cases fall upon the accused."

This approach recently adopted by the High Court was taken by the Court of Appeal in New Zealand in the case of *Reg. v. Strawbridge* [1970] N.Z.L.R. 909, cited with approval in *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523.

It is therefore necessary to apply the presumption referred to in *He Kaw Teh v. The Queen* (*supra*) to the provisions of the Road

Safety (Alcohol and Drugs) Act 1970, s.6(1) and (2). Regard must be had to:

- (1) the language of the Act and its subject-matter;
- (2) the mischief which the Act seeks to prevent;
- (3) from (1) and (2) the purpose of the Act.

It is widely accepted that driving motor vehicles whilst affected by alcohol is a grave social evil responsible for widespread injury and death and consequential economic harm in our community. The offences described in s.6(1) and (2) of the Act expose the offender to risk of fine or imprisonment or licence disqualification or all three. The Act makes provision for mandatory submission to testing for the purpose of determining the concentration of alcohol in a driver's blood. Section 14 makes it an offence to fail or refuse without reasonable excuse to undergo such testing. Extensive evidentiary provisions facilitate the proof of matters relevant to offences and enact certain deeming provisions.

All of this irresistibly leads to the conclusion that Parliament intended to make the act of driving a motor vehicle with alcohol in the body in the case of a first year driver or alcohol in the blood in excess of the prescribed concentration in other cases an offence without proof of any general or specific intent. However, that is not to say that Parliament also intended that criminal responsibility, capable of attracting substantial penalties, would follow even in the face of a mistaken belief honestly held and based on reasonable grounds in the existence of facts which if true, would make the acts complained of innocent.

Section 23(1) and (2) provide that the concentration of alcohol in the blood at the time of testing in accordance with the provisions of the Act shall be deemed to be the actual concentration of alcohol in the blood at the time the sample is taken "unless it is shown on the balance of probabilities that the concentration of alcohol in (the) blood at the time was greater than the prescribed concentration".

Section 23(4) and (5) deem the concentration of alcohol in the blood at the time of testing to be the concentration of alcohol in the blood at the relevant time provided that time occurred within four hours of testing unless, in the case of offences against s.6(1) "it is shown that the concentration of alcohol in [the] blood at the time of that act of driving was not greater than the prescribed concentration" and, in the case of offences against s.6(2) "unless the contrary is proved".

All these sections are directed to facilitating proof of a critical matter of fact, namely the concentration of alcohol in the blood at the time of driving a motor vehicle. However, their terms do not in my opinion indicate an intention on the part of Parliament to exclude the presumption referred to earlier concerning an honest and

reasonable mistake about the existence of that critical matter of fact. The sections referred to do not touch upon the issue of mistake of fact. They deal with the manner in which relevant facts may be proved to exist. The so-called defence of mistake of fact will only operate in circumstances where criminating facts have been established. Thus, I see nothing in the provisions of s.25 to lead me to the conclusion that Parliament thereby impliedly intended to exclude the so-called defence of mistake of a fact.

Although each statute demands its own interpretation, it is instructive to note that in both Queensland and New Zealand it has been held that "the defence" of mistake of fact has not been excluded in legislation prohibiting the driving of motor vehicles with a concentration of alcohol in the blood in excess of the prescribed concentration. In *Rooke v. Auckland City Council* [1980] 1 N.Z.L.R. 680, at p.694, Holland J. said:

"Parliament intended that the Crown should prove beyond reasonable doubt that an offender was driving a motor vehicle with a certain percentage of alcohol in his blood and there was no onus on the Crown to prove knowledge or intent as to the alcohol on the part of the offender. Should, however, the offender establish that the alcohol was in his blood without his knowledge on reasonable grounds of facts from which such a percentage of alcohol could get into his blood or a defence of reasonable mistake of fact relating thereto, then he should be acquitted."

His Honour went on to say that in the light of *Reg. v. Strawbridge* [1970] N.Z.L.R. 909 "reasonable possibility of such an honest belief or mistake of fact is sufficient to entitle an offender to an acquittal".

In Queensland the question first came to the attention of the Full Court in *Harmer v. Grace, ex p. Harmer* [1980] Qd.R. 395. The evidentiary provisions in the relevant Queensland statute were similar to those contained in the Act. The Full Court held that there was nothing in the provisions of the Queensland *Traffic Act* 1949-1977 which operated to exclude the so-called defence of mistake of fact. Referring to sections having similar evidentiary effect to the *Road Safety (Alcohol and Drugs) Act* 1970, s.23, Connolly J. pointed out that such sections concern themselves with evidence and not criminal responsibility incurred upon proof of the matters proscribed by the equivalent to s.6(1) of our Act.

In *Smith v. Le Mura, ex p. Smith* [1983] 1 Qd.R. 535 the Full Court of Queensland considered whether, upon a charge of driving under the influence of liquor, resort could be had to "the defence" of mistake of fact. The *Traffic Act* 1949-1982 (Qd.), s.16(3), provided that a blood alcohol content of or in excess of 0.15% was conclusive proof of being under the influence. Only two judgments were delivered as one of the judges died before judgment was handed down. The earlier decision of

Harmer v. Grace, ex p. Harmer (*supra*) was discussed but not reconsidered in either of the judgments. However, Andrews S.P.J. held that mistake of fact was not open upon a charge of driving under the influence as criminal responsibility arose not from the fact of the concentration of alcohol in the blood but the result which flowed from that fact. MacCrossan J. did not share this view and held, albeit with reservations, that mistake of fact could operate in very rare circumstances to avoid a conviction upon a charge of driving under the influence.

In *Pascoe v. Christie* [1984] 1 Qd.R. 464 this issue was again before the Full Court of Queensland. *Harmer v. Grace, ex p. Harmer* [1980] Qd.R.395 was not disapproved, but the exceptional nature of the facts in that case was emphasised by Connolly J. at p. 466 when he said this:

"I think it is timely to say a word about *Harmer v. Grace, ex parte Harmer*. It was a case in which the s.24 defence" [mistake of fact] "succeeded. It was emphasised that the case was quite unusual. In particular the evidence of the accused person could be demonstrated, on a meticulous examination of the evidence, to be consistent with the certificate. There was the additional factor that there were no indicia and the recorded blood alcohol level was precisely at the prohibited degree which was then .08%. All of these circumstances were important to the decision and it was emphasised in an attempt to assist magistrates that it was unlikely that such a combination of circumstances would recur. It is quite wrong to treat the decision as an invitation to magistrates to ignore the fact as determined by the certificate in assessing the veracity of the accused."

In considering the Queensland cases it must be remembered that the Queensland *Criminal Code*, s.36, enacts that the provisions of Chapter V of the *Code* apply to all persons charged with any offence against the statute law of Queensland. Section 24 which is contained in Chapter V of the Queensland *Criminal Code* provides:

"24. *Mistake of fact.* A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

"*The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.*"

[His Honour's emphasis]

However, regard must be had to the strong words used in the judgments in *He Kaw Teh v. The Queen* (1985) 157 C.L.R. 523, such as:

"It is now firmly established that mens rea is an essential ingredient in every statutory offence unless, having regard to the

language of the statute and to its subject-matter, it is excluded expressly or by necessary implication." (per Brennan J. at p.566).

The Queensland cases are therefore of assistance upon a consideration of the meaning of s.6 of our Act.

For these reasons I conclude that the learned magistrate fell into error in holding that the provisions of the *Road Safety (Alcohol and Drugs) Act* 1970, s.6(2), left no room for a consideration of a mistaken belief on reasonable grounds and honestly held by the applicant in the existence of facts which if true would have rendered his acts innocent.

However that does not dispose of this appeal. There remains the second and third grounds of appeal. In his reasons for judgment the learned magistrate held that in any event the belief of the applicant was not held on reasonable grounds. It is necessary to set out a conspectus of the relevant facts which did not appear to be in dispute.

On the evening in question the applicant went to a hotel. He knew he was not allowed to drive with any alcohol in his body. He arrived at about 10.00 p.m. and left at about 1.00 a.m. the following morning. According to his evidence he consumed two six ounce beers whilst there, waited for about 30 minutes after consuming the last and then blew into a machine which he called a breathalyser machine fixed to a wall in the hotel. He said the machine registered .000 and he thought the alcohol had left his blood. He claimed to have no knowledge of the rate of metabolism of alcohol in the body. At 1.55 a.m. the concentration of alcohol in his body was determined by breath analysis in accordance with the Act to be 0.04%. No evidence about the machine in the hotel was adduced other than a description of what appeared upon its face. The applicant inserted some coins and blew with the aid of a straw into the space provided. He said the machine indicated a blood alcohol concentration of .000 and on this information he believed he had no alcohol in his body. From the transcript of evidence it is not quite clear how this reading was obtained as the top of the machine is apparently divided into three square boxes or sections, one of which lights up, presumably to indicate the breath analysis of the user. The first of these sections has written on it:

.000 - .035

You are below legal
driving limit.

Re-test yourself after further
alcoholic drinks.

The second and third sections indicate blood alcohol concentrations between .035-.050 and .050 and above respectively. Eight separate instructions were written on the front of the machine describing the manner in which it was to be used, the seventh of which

was "repeat test to check for rising or falling alcohol level". At the foot of the instruction there appeared these words:

"CAUTION

The reading as obtained from the correct use of this instrument is considered accurate but the owner or manufacturer accepts no responsibility or liability in respect thereof.

IT IS THEREFORE MOST IMPORTANT THAT IF IN DOUBT YOU DO NOT TAKE ANY RISK."

The learned magistrate found that the applicant did not comply with instruction 7. He held that as a consequence, any belief he had was not based on reasonable grounds. I would go a great deal further than the learned magistrate.

The grounds upon which an honestly held belief is based must be reasonable. See *Proudman v. Dayman* (1941) 67 C.L.R. 536, at p.541; *Bergin v. Stack* (1953) 88 C.L.R. 248. In the absence of acceptable evidence, that used at the time it was and in the manner it was the machine accurately recorded the concentration of alcohol in the applicant's blood, it could not be said that any belief he held was based on reasonable grounds. The applicant's belief was based upon the mere use of a machine loosely referred to by him as breathalyser machine. The uncontradicted facts were that:

- (1) the applicant had consumed alcohol;
- (2) the applicant drove a motor vehicle;
- (3) at 1.55 a.m. the concentration of alcohol in his blood was 0.04%

It would require very cogent evidence indeed to raise a reasonable doubt as to whether the applicant honestly held a mistaken belief based on reasonable grounds that there was no alcohol in his blood at the relevant time. The use of any machine, even strictly in accordance with instructions written on it could not, in the absence of evidence relating to its accuracy, given rise to any such reasonable doubt.

Cases where "the defence" of honest and reasonable mistake will succeed in prosecutions for offences contrary to the *Road Safety (Alcohol and Drugs) Act 1970* s.6(1) and (2), will be very rare. It is perhaps appropriate to quote the following passage from *Harmer v. Grace*, ex p. *Harmer* [1980] Qd. R. 395, at p.400:

'Lest it be thought that the decision in this case opens the floodgates to a spate of unmeritorious defences under s.24" [honest and reasonable mistake] "it should be emphasised that the case is quite unusual. Not only did the respondent entertain the relevant belief but his belief was found in terms to be genuine, there were no objective indications to the contrary and there were precise findings as to the quantity of alcohol he had consumed and all of these factors combine to support the defence

under s.24. A combination of such circumstances is unlikely to be common in situations in which the breath analysing instrument records a blood alcohol level of the prohibited degree."

The learned magistrate did not err in finding the complaint proved and this appeal is dismissed.

Motion dismissed.

Attorneys for the applicant: *Lowrie, Longbottom and Blissenden.*

Attorney for the respondent: *B. H. Burkett*, Crown Solicitor.

A.C.R.